



HIGH COURT BULLETIN

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A record of recent High Court of Australia cases: decided, reserved for judgment, awaiting hearing in the Court's original jurisdiction, granted special leave to appeal, refused special leave to appeal and not proceeding or vacated

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SUMMARY OF NEW ENTRIES

[1: Cases Handed Down](#)

Case	Title
Fortescue Metals Group Limited and Ors v The Commonwealth of Australia	Constitutional Law
Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd ACN 075 483 644	Industrial Law
Legal Services Board v Gillespie-Jones	Legal Practitioners
Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors	Native Title

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Case	Title
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Clark v Macourt	Civil Procedure
Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liquidation) & Ors	Corporations Law
Bugmy v The Queen; Munda v The State of Western Australia	Criminal Law
Diehm & Anor v Director of Public Prosecutions Nauru	Criminal Law
Comcare v PVYW	Industrial Law
Wingfoot Australia Partners Pty Ltd & Anor v Kocak & Ors	Statutes

3: Original Jurisdiction

Case	Title
Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship and Ors	Constitutional Law
Unions NSW and Ors v State of New South Wales	Constitutional Law

4: Special Leave Granted

Case	Title
Kline v Official Secretary to the Governor General & Anor	Administrative Law
Australian Competition and Consumer Commission v TPG Internet Pty Ltd	Competition Law
Li v Chief of Army	Criminal Law
Zirilli; & Barbaro v The Queen	Criminal Law
James v The Queen	Criminal Law
Australian Financial Services and Leasing Pty Limited v Hills Industries Limited & Anor	Equity

1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the August 2013 sittings.

Constitutional Law

Fortescue Metals Group Limited and Ors v The Commonwealth of Australia

S163/2012: [\[2013\] HCA 34](#).

Judgment delivered: 7 August 2013.

Coram: French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

Catchwords:

Constitutional law – Powers of Commonwealth Parliament – Constitution, s 51(ii) – "[T]axation; but so as not to discriminate between States or parts of States" – *Minerals Resource Rent Tax Act 2012* (Cth), *Minerals Resource Rent Tax (Imposition—Customs) Act 2012* (Cth), *Minerals Resource Rent Tax (Imposition—Excise) Act 2012* (Cth), *Minerals Resource Rent Tax (Imposition—General) Act 2012* (Cth) ("Acts") established and imposed minerals resource rent tax ("MRRT") – Amounts paid as State royalties allowed under Acts as royalty credits – Available royalty credits which do not exceed mining profit deductible from MRRT as royalty allowance – Effect of Acts alleged to be that liability to pay MRRT varies between States and that reduction in State royalty increases liability to pay MRRT by the amount of the reduction – Whether Acts discriminate between States contrary to s 51(ii) of Constitution.

Constitutional law – Constitution, s 99 – Prohibition on Commonwealth, by any law of revenue, giving preference to one State over another – Whether Acts give preference to one State over another.

Constitutional law – *Melbourne Corporation* doctrine – Whether Acts discriminate against or place particular burden upon operations or activities of States, beyond legislative power of Commonwealth Parliament.

Constitutional law – Constitution, s 91 – "Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals" – Whether Acts contravene s 91.

Words and phrases – "discrimination", "*Melbourne Corporation* doctrine", "minerals resource rent tax", "preference in trade,

commerce or revenue", "State royalties", "States or parts of States".

This writ of summons was filed in the original jurisdiction of the High Court of Australia.

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Industrial Law

Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd ACN 075 483 644
P26/2013: [\[2013\] HCA 36](#).

Judgment delivered: 14 August 2013.

Coram: Crennan, Kiefel, Bell, Gageler and Keane JJ.

Catchwords:

Industrial law (Cth) – Payments relating to periods of industrial action – Where employer provided employees with accommodation under enterprise agreement – Where employees took "protected industrial action" within meaning of s 408 of *Fair Work Act 2009* (Cth) ("Act") – Where employer ceased to provide accommodation to employees for duration of "protected industrial action" – Whether provision of accommodation a "payment to an employee in relation to the total duration of the industrial action" under s 470(1) of Act.

Industrial law (Cth) – Enterprise agreement – Whether employees entitled to accommodation under terms of enterprise agreement when not ready, willing and available to work.

Words and phrases – "adverse action", "enterprise agreement", "in relation to", "payment", "protected industrial action", "ready, willing and available to work".

Appealed from FC: [\[2012\] FCA 850](#).

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Legal Practitioners

Legal Services Board v Gillespie-Jones
M27/2013: [\[2013\] HCA 35](#).

Judgment delivered: 14 August 2013.

Coram: French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

Catchwords:

Legal practitioners – Legal Practitioners Fidelity Fund ("Fidelity Fund") – Barrister briefed by solicitor to appear for client – Money paid into general trust account by client on account of legal costs – Money misappropriated by solicitor – No finding that client instructed solicitor to pay third parties – Whether barrister entitled to claim against Fidelity Fund for unpaid fees.

Words and phrases – "default", "failure to pay or deliver trust money", "pecuniary loss", "persons for or on whose behalf money is held", "transit money", "trust money".

Appealed from VSC (CA): [\[2012\] VSCA 68](#).

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Native Title

Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors

B58/2012: [\[2013\] HCA 33](#).

Judgment delivered: 7 August 2013.

Coram: French CJ, Hayne, Crennan, Kiefel and Bell JJ.

Catchwords:

Native title – Native title rights in relation to waters – Determination made in relation to waters in Torres Strait – Determination included native title right to access and take for any purpose resources in native title areas – Successive Commonwealth and Queensland legislative regimes prohibited taking fish and other aquatic life for commercial purposes without licence – Whether legislative regimes inconsistent with continued existence of native title right – Whether right to access and take resources in native title areas partially extinguished where resources taken for commercial purposes.

Native title – Native title rights in relation to waters – Certain reciprocal access and use rights recognised in Islander society – Reciprocal rights arose out of personal relationships – Whether reciprocal rights "native title rights and interests" within meaning of s 223(1) of *Native Title Act 1993* (Cth).

Words and phrases – "extinguishment", "inconsistent with the continued existence of a native title right", "native title rights and interests", "reciprocal rights".

Appealed from FCA (FC): (2012) 289 ALR 400, [\[2012\] FCAFC 25](#).

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Words and Phrases

See also [Constitutional Law](#): *Fortescue Metals Group Limited and Ors v The Commonwealth of Australia*.

See also [Industrial Law](#): *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd ACN 075 483 644*.

See also [Legal Practitioners](#): *Legal Services Board v Gillespie-Jones*

See also [Native Title](#): *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors*.

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2: CASES RESERVED

The following cases have been reserved or part heard by the High Court of Australia.

Administrative Law

See also [Statutes](#): *Wingfoot Australia Partners Pty Ltd & Anor v Kocak & Ors*

Civil Procedure

Clark v Macourt
S9/2013: [\[2013\] HCATrans 174](#).

Date heard: 13 August 2013.

Coram: Hayne, Crennan, Bell, Gageler and Keane JJ.

Catchwords:

Civil Procedure – Damages – Assisted reproductive technology practice – Damages for breach of various warranties contained in the Deed relating to donor sperm – Proper categorisation of the contract – Whether the trial judge erred in not concluding that the respondent had fully mitigated her loss – Whether the respondent avoided the loss she otherwise would have sustained by having to replace the non-compliant sperm by charging her patients for the cost of replacement sperm.

Civil Procedure – Costs – Whether the respondent would have been entitled to indemnity costs if the award of damages was upheld in her favour.

Appealed from NSW (CA): [\[2011\] NSWSC 1276](#); [\[2012\] NSWCA 367](#).

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Constitutional Law

See also [Criminal Law](#): *Lee & Anor v New South Wales Crime Commission*

Corporations Law

Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liquidation) & Ors

M99/2012: [\[2013\] HCATrans 171](#).

Date heard: 9 August 2013.

Coram: French CJ, Hayne, Kiefel, Gageler and Keane JJ.

Catchwords:

Corporations law – Liquidation – Liquidator of lessor disclaims lease agreement under s 568(1) of *Corporations Act 2001* (Cth) – Whether disclaimer extinguishes leasehold interest – Whether leasehold interest survives termination of the lease agreement.

Appealed from VSC (CA): [\[2012\] VSC 29](#); [\[2012\] VSCA 202](#).

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Criminal Law

Lee & Anor v New South Wales Crime Commission

S292/2012: [\[2013\] HCATrans 93](#).

Date heard: 1 May 2013.

Coram: French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

Catchwords:

Criminal law – Recovery of proceeds of crime – Examination orders – Whether examination would interfere with the administration of justice in criminal proceedings – Whether examination order may be made where criminal charges pending against examinee – Whether procedural protections available to prevent abuse of power – *Criminal Assets Recovery Act 1990* (NSW), ss 13A, 31D, 63.

Constitutional law – Ch III of the Constitution – Separation of judicial powers – Functions incompatible with institutional integrity of State Supreme Court – Validity of s 31D of *Criminal Assets Recovery Act 1990* (NSW) – Whether requiring a State Supreme

Court to make an examination order without regard to the capacity of that order to prejudice the fair trial of the person is incompatible with Ch III.

Statutes – *Criminal Assets Recovery Act 1990* (NSW) ss 13A, 31D, 63 – Examination orders – Whether power to order examination limited by general law principles relating to a fair trial.

Appealed from NSW (CA): [\[2012\] NSWCA 276](#).

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Bugmy v The Queen

S16/2013: [\[2013\] HCATrans 167](#).

Date heard: 6 August 2013.

Coram: French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

Catchwords:

Criminal law – Sentencing – *Fernando* considerations – Whether Court of Appeal erred by failing to consider question of manifest inadequacy and exercise of residual discretion when increasing sentence – Whether Court of Appeal erred in holding that weight to be given to *Fernando* considerations is diminished over passage of time – Whether mental illness relevant in sentencing – Whether discretion of sentencing judge miscarried by virtue of assessment of objective seriousness of offence.

Appealed from NSW CCA: [\[2012\] NSWCCA 223](#).

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Munda v The State of Western Australia

P28/2012: [\[2013\] HCATrans 168](#).

Date heard: 6 August 2013.

Coram: French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

Catchwords:

Criminal law – Sentencing – Residual discretion – Principles governing operation of residual discretion – Appellant found guilty of unlawful killing of de facto wife – Sentenced to 5 years and 3 months imprisonment – Court of Appeal allowed Crown appeal and increased sentence to 7 years and 9 months – Court of Appeal accepted that it had residual discretion to disallow prosecution

appeal against sentence but chose not to exercise it – Whether Court of Appeal erred in holding that residual discretion should only be exercised where parity considerations arise.

Criminal law – Sentencing – *Fernando* considerations – Whether Court of Appeal erred in application of *Fernando* principles.

Criminal law – Sentencing – Manifest inadequacy – Whether prosecution appeal contending manifest inadequacy is a proper occasion for intermediate court to review appropriateness of sentencing range.

Appealed from WASC (CA): [\[2012\] WASCA 164](#).

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Diehm & Anor v Director of Public Prosecutions Nauru
B15/2013: [\[2013\] HCATrans 170](#).

Date heard: 8 August 2013.

Coram: French CJ, Kiefel and Bell JJ.

Catchwords:

Criminal law – Rape – Prosecutor’s duty of fairness – Failure to call material witnesses – Whether failure by prosecution to call material witnesses amounts to an unfair trial and a miscarriage of justice – Whether Chief Justice had a statutory duty to call material witnesses on own motion – Whether failure to do so amounts to a miscarriage of justice – Where Chief Justice referred to material not in evidence – Whether reference to material not in evidence amounted to a denial of procedural fairness – Whether in all of the circumstances a reasonable tribunal of fact could have concluded beyond reasonable doubt that the Appellants were guilty of rape.

Appealed from Supreme Court of Nauru: [2011] NRSC 24.

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Industrial Law

Comcare v PVYW
S8/2013: [\[2013\] HCATrans 169](#).

Date heard: 7 August 2013.

Coram: French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ.

Catchwords:

Industrial law – Workers' compensation – Interpretation of the principle in *Hatzimanolis v ANI Corporation Limited* – Employee injured while having sex during overnight stay at motel room booked by employer – Injuries sustained during an interval or interlude within an overall period of work – Whether injuries arose "in the course of" her employment – Whether sufficient connection between the suffering of the injury and the employment – Whether sufficient that injuries sustained at a place employer induced or encouraged employee to be – Whether activity employee undertaking and other factors surrounding the injury relevant to the inquiry.

Appealed from FCA (FC): (2012) 291 ALR 302; [\[2012\] FCA 395](#); [\[2012\] FCAFC 181](#).

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Intellectual Property

Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd & Ors
S1/2013: [\[2013\] HCATrans 123](#); [\[2013\] HCATrans 124](#).

Date heard: 28 & 29 May 2013.

Coram: French CJ, Hayne, Crennan, Kiefel and Gageler JJ.

Catchwords:

Intellectual Property – Patents – Patent claimed administration of pharmaceutical drug as method of preventing or treating particular condition – Administration of drug for different purpose than that specified in patent had effect of preventing or treating condition referred to in patent – Whether methods of treating human body patentable inventions within the meaning of s 18(1)(a) of the *Patents Act 1900* (Cth) – Whether second or subsequent medical uses of previously known products patentable inventions.

Intellectual Property – Patents – Infringement – Patent claimed use of compound for treatment of a specified disease – Whether a person who supplies the compound and indicates its use for treatment of a different disease infringes the patent under s 177(1) of the *Patents Act 1990* (Cth).

Appealed from FCA (FC): (2012) 204 FCR 494; (2012) 290 ALR 1; (2012) 96 IPR 185; [\[2012\] FCAFC 102](#).

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Statutes

See also [Criminal Law](#): *Lee & Anor v New South Wales Crime Commission*

Wingfoot Australia Partners Pty Ltd & Anor v Kocak & Ors
M107/2012: [\[2013\] HCATrans 175](#).

Date heard: 14 August 2013.

Coram: French CJ, Crennan, Bell, Gageler and Keane JJ.

Catchwords:

Statutes – Whether by virtue of s 68(4) of the *Accident Compensation Act 1985* (“ACA”) a court is bound to accept medical panel opinions – Whether function exercised by medical panel under s 68 ACA is quasi-adjudicative/investigative – Appropriate content of right to reasons under s 68(2).

Administrative Law – Judicial review – Certiorari – Error of law on face of record – Whether failure to give adequate reasons constituted an error of law on the face of the record.

Appealed from VSC (CA): [\[2011\] VSC 285](#); [\[2012\] VSCA 259](#).

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3: ORIGINAL JURISDICTION

The following cases are ready for hearing in the original jurisdiction of the High Court of Australia.

Administrative Law

See also [Constitutional Law](#): *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship and Ors*

Citizenship and Migration

See also [Constitutional Law](#): *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship and Ors*

Constitutional Law

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship and Ors

M76/2013: *Special Case*

Catchwords:

Constitutional law – Chapter III – *Migration Act 1958* (Cth) (“the Act”) – Plaintiff found to be a refugee but refused protection visa and subsequently detained at Sydney Immigration Residential Housing – Whether detention is authorised by ss 189 and 196 of the Act – Whether ss 189 and 196 are beyond the legislative power of the Commonwealth as inconsistent with Ch III of the Constitution.

Citizenship and migration – Migration – Refugees – Protection visas – Plaintiff found to be a refugee but refused protection visa due to adverse security assessment by Australian Security Intelligence Organisation (“ASIO”) – Department relied on public interest criterion 4002 which requires that applicant not be assessed by ASIO to be a risk to security – In *Plaintiff M47 v Director-General of Security* public interest criterion 4002 found to be beyond power conferred by s 31(3) of the *Migration Act 1958* (Cth) – Whether the

Secretary made an error of law by relying on Public Interest Criterion 4002.

Administrative law – Error of law – Minister may only grant protection visa under s 46A(2) of the Act – Officer of the Commonwealth failed to refer Plaintiff's case to the Minister for determination under s 46A(2) because of adverse security assessment – Whether failure to do so constitutes an error of law.

This special case was filed in the original jurisdiction of the High Court of Australia.

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Unions NSW and Ors v State of New South Wales **S70/2013: Special Case**

Catchwords:

Constitutional law – Limitation on State legislative power – Implied freedom of political communication on governmental and political matters – *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (“the EFED Act”) – s 96D of the EFED Act prohibits political donations other than by individuals on the electoral roll – Whether s 96D of the Act impermissibly burdens the implied freedom and is therefore invalid – Whether ss 95F, 95G(6) and 95I of the EFED Act impermissibly burden the implied freedom and are therefore invalid.

Constitutional law – Limitation on State legislative power – Implied freedom of association – Whether s 96D of the EFED Act impermissibly burdens a freedom of association provided for in the Commonwealth Constitution.

Constitutional law – State constitutions – *Constitution Act 1902* (NSW) (“the Constitution Act”) – Whether ss 7A and 7B of the Constitution Act give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters – If so, whether s 96D or ss 95F, 95G(6) and 95I of the EFED Act impermissibly burden the implied freedom and are therefore invalid.

Constitutional law – Inconsistency – s 109 of the Commonwealth Constitution – *Commonwealth Electoral Act 1918* (Cth) (“the CEA Act”) – Whether s 96D is invalid under s 109 of the Commonwealth Constitution because it is inconsistent with ss 327 or Part XX of the CEA Act.

This special case was filed in the original jurisdiction of the High Court of Australia.

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4: SPECIAL LEAVE GRANTED

The following cases have been granted special leave to appeal to the High Court of Australia.

Administrative Law

Kline v Official Secretary to the Governor General & Anor
B10/2013: [\[2013\] HCATrans 180](#).

Date heard: 16 August 2013 – *Special leave granted*.

Catchwords:

Administrative law – Freedom of Information – *Freedom of Information Act 1982* (Cth) (“the Act”) – Request for access to documents – Documents concerning appointments to the Order of Australia – Under s 6A documents that relate to matters of an administrative nature are exempt from the Act – Whether documents that relate to powers and functions of Governor General in administering the Order of Australia relate to matters of an administrative nature – Meaning of “administrative nature”.

Words and phrases – “of an administrative nature” – “substantive power or function”.

Appealed from FCA (FC): [\[2012\] FCAFC 184](#); (2012) 127 ALD 639; [\(2012\) AATA 247](#).

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Civil Procedure

Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors
S12/2013: [\[2013\] HCATrans 137](#).

Date heard: 6 June 2013 – *Special leave granted*.

Catchwords:

Civil procedure – Discovery – Privilege – Documents upon which legal professional or client legal privilege attached inadvertently disclosed to the other side – Whether such inadvertent disclosure has the effect of waiving privilege.

Civil procedure – Discovery – Confidential information – Whether the only basis on which the respondents could be prohibited from using the documents, or required to return the documents, was dependent on whether the circumstances on which they were communicated to or obtained by the respondents were such as to impose an obligation of conscience on the respondents – Whether an obligation of conscience could be imposed on the respondents in the circumstances.

Appealed from NSWSC (CA): [\[2012\] NSWSC 393](#); [\[2012\] NSWCA 430](#).

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Competition Law

Australian Competition and Consumer Commission v TPG Internet Pty Ltd

M10/2013: [\[2013\] HCATrans 177](#).

Date heard: 16 August 2013 – *Special leave granted*.

Catchwords:

Competition law – Restrictive trade practices – Misleading or deceptive conduct – False or misleading statements – *Trade Practice Act 1974* (Cth) ("TPA") and *Australian Consumer Law*, Schedule 2 to the *Competition and Consumer Act 2010* (Cth) ("CCA") – Full Federal Court overturned in part decision of trial judge that TPG had breached the TPA and CCA – Advertisements represented that internet service could be acquired for \$29.99 a month with no additional service or monthly charge and no set up fee – Service was only available in conjunction with a home telephone line that cost an additional \$30 a month (the 'bundling condition'), as well as upfront charges and a deposit (the 'setup fee condition') – Whether ordinary and reasonable consumer would have starting assumption that an advertised internet service was bundled with telephony services – Whether consumers must consider whole of an advertisement (including small print or quickly spoken detail) in order to correct what would otherwise be misleading headline representations.

Competition law – Penalties – Pecuniary penalties – Full Court reduced pecuniary penalty from \$2,000,000 to \$500,000 – Whether Full Court failed to adequately consider specific and general deterrence in imposing reduced pecuniary penalty – Whether reduced pecuniary penalty manifestly inadequate.

Appealed from FCA (FC): [\[2012\] FCAFC 190](#); [\[2013\] FCAFC 37](#); [\[2011\] FCA 1254](#); [\[2012\] FCA 629](#).

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Constitutional Law

Magaming v The Queen

S58/2013: [\[2013\] HCATrans 140](#).

Date heard: 6 June 2013 – *Special leave granted*.

Catchwords:

Constitutional law – Criminal law – Mandatory minimum sentences – Appellant convicted of people smuggling contrary to s 233C of the *Migration Act 1958* (Cth) (“the Act”) – s 236B of the Act prescribed a mandatory minimum penalty of 5 years imprisonment – Whether s 236B of the Act requires the exercise of the judicial power of the Commonwealth in a manner inconsistent with its nature – Whether s 236B(3) of the Act when read with ss 233A(1) and 233C(1) authorises the executive government to direct the outcome of the exercise of the court’s federal jurisdiction to sentence offenders – Whether s 236B(3) is therefore invalid as contrary to Ch III of the Constitution.

Appealed from NSWSC (CCA): [\[2013\] NSWCCA 23](#).

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Criminal Law

PEB v The Queen

B9/2013: [\[2013\] HCATrans 135](#).

Date heard: 5 June 2013 – *Special leave granted*.

Catchwords:

Criminal law – Sufficiency of reasons – Verdict unreasonable or not supported by evidence – Appellant convicted of two counts of unlawfully and indecently dealing with a child under 12 years old and in his care – Appellant appealed from conviction on basis that verdict was unreasonable or not supported by evidence – Whether Court of Appeal is required to provide detailed reasons for its conclusion that verdict was not unreasonable or was supported by evidence – Whether Court of Appeal must undertake an independent assessment of the evidence in determining such question.

Appealed from QCA (CA): [\[2012\] QCA 333](#).

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Reeves v The Queen

S58/2013: [\[2013\] HCATrans 143](#).

Date heard: 6 June 2013 – *Referred to Full Court*.

Catchwords:

Criminal law – Surgical procedure – Informed consent – Appellant conducted a “simple vulvectomy” on a patient – Surgery unnecessary and appellant later convicted of grievous bodily harm with intent – Whether a surgeon must inform a patient of the “nature and extent” of an operation or simply the “nature” of the operation in order to meet the standard of informed consent – Whether Court of Appeal erred in relying on the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW)

Appealed from NSWSC (CCA): [\[2013\] NSWCCA 34](#).

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Li v Chief of Army

S47/2013: [\[2013\] HCATrans 188](#).

Date heard: 16 August 2013 – *Special leave granted*.

Catchwords:

Criminal law – *Defence Force Discipline Act 1982* (Cth) (“the Act”) – Restricted Court Martial – Appellant convicted of creating a disturbance under s 33(b) of the Act – Proper construction of s 33(b) – Whether offence under s 33(b) requires proof that the accused intended to create a disturbance – Whether Chapter 2 of the *Criminal Code* (Cth) permits fault element of an offence to be framed by reference to terms and particulars of charge rather than terms of section creating offence – Whether offence under s 33(b) requires an element of actual violence.

Words and phrases – “Creates a disturbance”.

Appealed from FCA (FC): [\[2013\] FCAFC 20](#); [\(2012\) 261 FLR 226](#).

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Zirilli; & Barbaro v The Queen
M1, M3/2013: [\[2013\] HCATrans 184](#).

Date heard: 16 August 2013 – *Referred to enlarged bench*.

Catchwords:

Criminal law – Sentencing – Crown submission on sentencing range – Appellants convicted of conspiracy to traffic in commercial quantity of controlled drug and sentenced to 26 years imprisonment – Trial judge refused to hear prosecution’s submission on appropriate sentencing range and imposed sentences higher than the range the prosecutor would have proposed – Whether trial judge erred in refusing to hear the prosecution’s submission on sentencing range – Whether refusal to hear prosecutions’ submission on sentencing range constitutes a denial of procedural fairness – Whether prosecution’s submission on sentencing range was a relevant consideration in sentencing – Whether *R v MacNeil-Brown* (2008) 20 VR 677 is good law.

Appealed from VSC (CA): [\[2012\] VSCA 288](#); [\[2012\] VSC 47](#).

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James v The Queen
M35/2013: [\[2013\] HCATrans 183](#).

Date heard: 16 August 2013 – *Special leave granted*.

Catchwords:

Criminal law – Alternative verdicts – Appellant convicted of intentionally causing serious injury – On Appeal appellant contended that trial judge’s failure to leave to jury possible alternative verdict of intentionally causing injury (as opposed to serious injury) constituted miscarriage of justice – Court of Appeal rejected contention – Defence counsel had chosen not to leave alternative verdict open for forensic reasons – Whether Court of Appeal erred in holding that trial judge not bound to leave the alternative verdict open for consideration by jury – Whether Court of Appeal erred in holding that trial judge’s duty to leave to jury for its consideration lesser alternative verdicts, that are realistically, or fairly and practically open, does not transcend forensic decision of trial counsel.

Appealed from VSC (CA): [\[2013\] VSCA 55](#); [\[2011\] VSC 596](#).

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Equity

Westpac Banking Corporation & Ors v Bell Group Ltd (In Liq) & Ors

P29/2012: [\[2013\] HCATrans 49](#).

Date heard: 15 March 2013 – *Special leave granted*.

Catchwords:

Equity – fiduciary duty – Judicial review – Whether courts can intervene to review the exercise of powers by directors on the basis of a lack of reasonable grounds for decision.

Equity – Fiduciary duty – Breach – Remedies – Equitable compensation versus account of profits – Whether compound interest should be utilised for restitutionary purposes – If so, whether the appropriate measure of compound interest can be determined – Whether on appeal the measure of compound interest was “grossly excessive” or a simple disgorgement of profits.

Equity – Fiduciary duty – *Barnes v Addy* – Particularisation of breach of fiduciary duty by directors – Whether recipient liability is available against a person who enters an executory transaction with a company involving a balance of rights and obligations that are performed on both sides before any act of avoidance – Whether accessorial liability requires a dishonest and fraudulent design by the trustee.

Appealed from WASC (CA): [\[2012\] WASCA 157](#).

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Australian Financial Services and Leasing Pty Limited v Hills Industries Limited & Anor

S359/2012: [\[2013\] HCATrans 191](#).

Date heard: 16 August 2013 – *Special leave granted*.

Catchwords:

Equity – Restitution – “Change of position” defence – AFSL paid money to Hills and another company to enable a third party to purchase certain equipment from Hills and the other company and then lease that equipment to the third party – The third party fabricated documents and contrary to AFSL’s belief no equipment was acquired – AFSL commenced proceedings in restitution against Hills and the other company – Trial Judge found for AFSL on basis that Hills gave no consideration for monies received from AFSL and

Hills had not suffered detriment arising out of a speculative change of its position after receiving those monies – Decision reversed on appeal – Court of Appeal held that by discharging debts owed to Hills by the third party Hills had given up opportunity to enforce payment of those debts – Whether defence of “change of position” in claims for money paid to third party by financier under mistake of fact extends to this situation – Whether in order to make out defence of change of position defendant is required to point to specific and quantifiable expenditure or financial loss because of mistaken payment?

Appealed from NSWSC (CA): [\[2012\] NSWCA 380](#).

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Native Title

Karpany & Anor v Dietman

A18/2012: [\[2012\] HCATrans 210](#).

Date heard: 7 September 2012 – *Referred to Full Court*

Catchwords:

Native title – Preservation of native title rights – Prior extinguishment – Native title right to take fish – Applicants convicted of possession of an aquatic resource contrary to s 72(2)(c) Fisheries Management Act 2007 (SA) – Whether native title rights to take fish extinguished by virtue of s 29 of the Fisheries Act 1971 (SA) – Whether s 72(2)(c) Fisheries Management Act 2007 (SA) inoperative due to inconsistency with s 221 of the *Native Title Act* 1993 (Cth).

Appealed from SA SC (FC): (2012) 112 SASR 51; (2012) 262 FLR 292; [\[2012\] SASCF 53](#).

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Statutes

Daly v Thiering & Ors

S38/2013: [\[2013\] HCATrans 139](#).

Date heard: 6 June 2013 – *Special leave granted*.

Catchwords:

Statutes – Statutory construction – Whether the Court of Appeal erred in its construction of s 130A of the *Motor Accidents Compensation Act 1999* (NSW) (“the MAC Act”) and s 6(1) of the *Lifetime Care and Support Act 2006* (NSW) (“the LCS Act”) – Whether s 130A of the MAC Act provides that the Lifetime Care and Support Scheme is responsible for the provision of all reasonable and necessary treatment and care required by participants – Or whether s 130A of the MAC Act provides that compulsory third party insurers are required to pay damages for voluntarily provided care.

Appealed from NSWSC (CA): [\[2013\] NSWCA 25](#); [\[2011\] NSWSC 1345](#); [\[2011\] NSWSC 1585](#).

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Words and Phrases

See also [Administrative Law](#): *Kline v Official Secretary to the Governor General & Anor*

See also [Criminal Law](#): *Li v Chief of Army*

5: CASES NOT PROCEEDING OR VACATED

The following cases in the High Court of Australia are not proceeding or have been vacated since *High Court Bulletin* 5 [2013] HCAB 05.

6: SPECIAL LEAVE REFUSED

Sydney: 25 July 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Duncan	Ipp & Ors (S132/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 189	Application dismissed with costs. [2013] HCATrans 157.

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Canberra: 14 August 2013

(Publication of Reasons)

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
AZACD	Minister for Immigration and Citizenship & Anor (A9/2013)	Federal Court of Australia [2013] FCA 174	Application Dismissed [2013] HCASL 117.
Kowalski	Mitsubishi Motors Australia Ltd (A11/2013)	Supreme Court of South Australia no MNC	Application Dismissed [2013] HCASL 118.
Shaw	The Attorney-General for the State of Victoria (M26/2013)	Supreme Court of Victoria (Court of Appeal) no MNC	Application Dismissed [2013] HCASL 119.
Shaw	The Attorney-General for the State of Victoria (M31/2013)	Supreme Court of Victoria [2013] VSC 106	Application Dismissed [2013] HCASL 120.
Defrutos	The Queen (M41/2013)	Supreme Court of Victoria (Court of Appeal) [2008] VSCA 55	Application Dismissed [2013] HCASL 121.
O'Driscoll	The State of Western Australia (P23/2013)	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 175	Application Dismissed [2013] HCASL 122.
Santos	The State of Western Australia (P27/2013)	Supreme Court of Western Australia (Court of Appeal) [2013] WASCA 39	Application Dismissed [2013] HCASL 123.
Bakarich	Commonwealth Bank of Australia & Ors (S7/2013)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 390	Application Dismissed [2013] HCASL 124.
Teoh	Hunters Hill Council & Anor (S45/2013)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 356	Application Dismissed [2013] HCASL 125.

SZNYF & Anor	Minister for Immigration and Citizenship & Anor (S52/2013)	Federal Court of Australia [2013] FCA148	Application Dismissed [2013] HCASL 126.
SZRJO & Anor	Minister for Immigration and Citizenship & Anor (S59/2013)	Federal Court of Australia [2013] FCA 179	Application Dismissed [2013] HCASL 127.
SZRBC & Ors	Minister for Immigration and Citizenship & Anor (S61/2013)	Federal Court of Australia [2013] FCA 197	Application Dismissed [2013] HCASL 128.
SZRPM	Minister for Immigration and Citizenship & Anor (S65/2013)	Federal Court of Australia [2013] FCA 196	Application Dismissed [2013] HCASL 129.
Kaur	Minister for Immigration and Citizenship & Anor (S78/2013)	Federal Court of Australia [2013] FCA 275	Application Dismissed [2013] HCASL 130.
Cvetkovic	The Queen (S86/2013)	Supreme Court of New South Wales (Court of Criminal Appeal) [2013] NSWCCA 66	Application Dismissed [2013] HCASL 131.
Manny	Shiels (C3/2012)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2012] ACTCA 22	Application Dismissed with Costs [2013] HCASL 132.
Kuek	The Honourable Justice Gray & Ors (M113/2012)	High Court of Australia [2012] HCATrans 273	Application Dismissed with Costs [2013] HCASL 133.
Kuehne & Anor	Warren Shire Council (S218/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 81	Application Dismissed with Costs [2013] HCASL 134.
Sumner	The Queen (M71/2012)	Supreme Court of Victoria (Court of Appeal) [2010] VSCA 221	Application Dismissed [2013] HCASL 135.

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Sydney: 16 August 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Calcutt	The Queen (S118/2012)	Supreme Court of New South Wales (Court of Criminal Appeal) [2012] NSWCCA 40	Application Dismissed [2013] HCATrans 192.
Hyder	Commonwealth of Australia (S328/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 336	Application Dismissed with costs [2013] HCATrans 194.
ACE Insurance Limited	Trifunovski (S23/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 3	Application Dismissed [2013] HCATrans 190.
ACE Insurance Limited	Dicinoski and Anor (S24/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 3	Application Dismissed [2013] HCATrans 190.

ACE Insurance Limited	Dicinoski (S25/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 3	Application Dismissed [2013] HCATrans 190.
ACE Insurance Limited	Perez (S26/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 3	Application Dismissed [2013] HCATrans 190.
ACE Insurance Limited	Peries (S27/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 3	Application Dismissed [2013] HCATrans 190.
Commercial Radio Australia Ltd	Phonographic Performance Company of Australia (S37/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 11	Application Dismissed with costs [2013] HCATrans 187.
BlueScope Steel (AIS) Pty Ltd	OneSteel Manufacturing Pty Ltd (S46/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 27	Application Dismissed with costs [2013] HCATrans 189.
Commissioner of Taxation	Macquarie Bank Limited (S56/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 13	Application Dismissed with costs [2013] HCATrans 185.
Commissioner of Taxation	Mongoose Pty Ltd (S57/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 13	Application Dismissed with costs [2013] HCATrans 185.
Fortress Credit Corporation (Australia) II Pty Limited & Anor	William John Fletcher and Katherine Elizabeth Barnet as Liquidators of Octaviar Limited (Receivers and Managers Appointed) (In Liquidation) and Octaviar Administration Pty Limited (In Liquidation) & Ors (S72/2013)	Application for Removal	Application Dismissed with costs [2013] HCATrans 186.
Almario	Varipatis (S90/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 76	Application Dismissed with costs [2013] HCATrans 193.

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Melbourne: 16 August 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Farquharson	The Queen (M19/2013)	Supreme Court of Victoria (Court of Appeal) [2012] VSCA 296	Application Dismissed [2013] HCATrans 182.

Gashi	Commissioner of Taxation (M32/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 30	Application Dismissed with costs [2013] HCATrans 181.
Gashi	Commissioner of Taxation (M33/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 30	Application Dismissed with costs [2013] HCATrans 181.
Director of Public Prosecutions	Maxwell (M34/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 50	Special leave refused [2013] HCATrans 178.
Bell	Commissioner of Taxation (M40/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 32	Application Dismissed with costs [2013] HCATrans 179.

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